No. 20941

United States
COURT OF APPEALS
for the Ninth Circuit

ILMAR KOIVUNEN,

Plaintiff-Appellant,

v.

STATES LINE,

Defendant-Appellee.

BRIEF OF APPELLEE

Appeal from the Judgment of the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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STATEMENT OF JURISDICTION

Appellant's Complaint was filed in the Circuit Court of the State of Oregon for the County of Coos and thereafter on November 2, 1964, served on appellee at Portland, Oregon. Appellee filed its Petition for Removal November 5, 1964. These documents do not appear in the Record on Appeal. Jurisdiction of the United States District Court for the District of Oregon was based on diversity of citizenship and the requisite

amount in controversy (R. 3) pursuant to 28 U.S.C.A. § 1441 (a) and 28 U.S.C.A. § 1332.

Judgment was entered in the trial court January 14, 1966 (R. 11). Appellant's motion for additur or in the alternative for a new trial was denied February 7, 1966. (R. 19). Notice of Appeal was filed March 1, 1966 (R. 21). Jurisdiction of the Court of Appeals is based on 28 U.S.C.A. § 1291.

The pleading showing the facts supporting jurisdiction is the Pretrial Order at page three of the Record on Appeal.

SUMMARY OF ARGUMENT

Appellant and his son were the only witnesses to the accident. They claim the shoring spontaneously fell after it had withstood tremendous forces at sea and had sat idle at the dock for four days.

The law does not require the jury to accept the testimony of interested witnesses and may legally be allowed to base its determination on circumstances and reasonable inferences to be drawn therefrom.

The uncontroverted facts in this case make it highly unlikely the shoring would have fallen absent human intervention. Facts developed from appellant himself and his witnesses make it appear that appellant either personally loosened the shoring or was aware it had been loosened. Standing near unsecured shoring which he knew to be loosened clearly justifies the application of contributory negligence.

ARGUMENT

The sole basis of appellant's appeal is his allegation there was no evidence of contributory negligence to justify submitting that issue to the jury and instructing thereon. Appellant's extensive references to the propriety or impropriety of the shoring and the medical testimony in his favor are, therefore, immaterial. Suffice it to say the extent of appellant's injury and damages and the seaworthiness of the vessel were closely contested issues of fact not now before this Court.

Appellee does not contend there was any direct evidence of contributory negligence. Appellee relies solely on circumstantial evidence, which clearly is sufficient proof of any fact.

> "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic* v. *Cleveland Tankers, Inc.,* 364 U.S. 325, 330, 81 S. Ct. 6, 5 L. Ed. 2d 20 (1960).

This Court has held that circumstantial evidence may properly be found to outweigh conflicting direct evidence. *Rocona* v. *Guy F. Atkinson Co.,* 173 F.2d 661, 665 (C.A. 9, 1949). In many respects that case is similar to the instant case. There respondent's employees, the only witnesses, denied specifically the acts of negligence the finder of fact attributed to them. The physical circumstances, however, spoke strongly against their denials as in the instant case.

Even in the absence of any direct evidence, the jury

is entitled to draw from circumstantial evidence reasonable inferences based on common experience. *Rutland* v. *Sikes,* 311 F.2d 538 (C.A. 4, 1962).

In the instant case there is no question that the shoring fell on appellant. If he loosened the bracings on the shoring, or knew they had been loosened by his son, and then voluntarily exposed himself to the shoring, clearly he was guilty of contributory negligence. The circumstances of the accident lead in two steps to the cogent inference that appellant in fact was guilty of such contributory negligence.

I. The Shoring Would Not Have Fallen Without Human Intervention.

The SS "OHIO" crossed the Columbia River bar in strong winds and winter seas when there would have been considerable pitching (Ex. 21, Tr. 58-60, 67). Thereafter, the log shows the vessel pitching and rolling moderately (Ex. 21). The vessel crossed the Coos Bay bar after waiting outside a period of time (Ex. 21). That bar is closed many times because of sea conditions (Tr. 68). The vessel then lay at the dock for four days (Ex. 21). There is no evidence that the vessel moved at all. There was evidence the vessel could have moved a little (Tr. 148), but further evidence showed that it would require swells to make the vessel pitch at the dock (Tr. 68, 69), and there are no swells at that location (Tr. 165). There was no testimony of any movement whatsoever of the vessel at the time of the accident. If there had been such movement appellant or his witnesses would have testified to it since it would have

tended to support his theory of spontaneous falling of the shoring. Despite the rough ocean voyage, the cargo and shoring were upright and intact when the longshoremen entered the hold.

At the time of the accident none of the bales of pulp fell. None, therefore, could have been resting against the shoring when it fell. If appellant's version of the accident is accepted, the shoring simply fell of its own weight, despite the bracings at least leaning, if not secured, against it. Moreover, all of the three tons (Tr. 50, 51) would have had to have collapsed spontaneously at the same instant.

Common experience in these circumstances compels the inference that the shoring and bracing that had withstood tremendous forces and then had stood undisturbed for four days would not have collapsed spontaneously without outside intervention. The circumstances strongly lead to the conclusion that the intervention was human.

II. The Human Intervention Must Have Been Appellant's Act.

Appellant and his son and two other longshoremen were the first workmen in the hold (Tr. 158). Other than the gang boss who made a cursory inspection (Tr. 158, 159), there were no other workmen in the hold (Tr. 5). Appellant and his son worked only on the starboard side; the other two worked only on the port side (Tr. 141).

Appellant and his son were sent into the hold to loosen and remove the exact bracing which fell on him

(Tr. 6). Appellant himself testified that no other person had touched the bracing (Tr. 10).

Appellant was within six feet of the shoring when it fell (Tr. 9). His explanation regarding a thermos bottle need not be accepted. *Delpit* v. *Nocuba Shipping Co.,* 302 F.2d 835, 838 (C.A. 5, 1962). It is particularly suspect in the light of his testimony that at the moment of the accident he was bending over to pick up a peavey (Tr. 7, 8)—a tool for loosening the braces (Tr. 147). Appellant says all of his work had been performed at the after end of the hatch (Tr. 7, 8), but the peavey, the tool of human intervention, was at hand at the forward end of the hatch within six feet of the shoring (Tr. 7, 8).

As between him and his son, appellant was in charge of the work and the role of the son was that of helper (Tr. 52).

These circumstances make it appear virtually certain that appellant loosened the bracings himself or knew that his son had done so.

The only direct evidence respecting the accident was that of appellant and his son. They denied interfering with the shoring in any way (Tr. 9, 1 0, 52). The fact that appellant and his son were the only witnesses did not compel the jury to accept their testimony. *Delpit* v. *Nocuba Shipping Co., supra.*

> ". . . Evidence of interested witnesses does not have to be accepted at face value, and the extent to which such evidence may be affected by self-interest is for the trier of the facts to determine." *Seletos* v. *Comm. of Int. Rev.,* 254 F.2d 794, 797 (C.A. 8, 1958).

CONCLUSION

The circumstantial evidence in this case clearly supports an inference of contributory negligence. The trial court did not err in submitting that issue to the jury. The judgment should be affirmed.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH
NATHAN J. HEATH

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United tSates Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN J. HEATH
Of Attorneys for Appellee